

1 ROB BONTA  
2 Attorney General of California  
3 NELI PALMA  
4 Senior Assistant Attorney General  
5 EMILIO VARANINI (SBN 163952)  
6 Supervising Deputy Attorney General  
7 LAUREN ZWEIER (SBN 291361)  
8 Deputy Attorney General  
9 455 Golden Gate Ave., Suite 11000  
10 San Francisco, CA 94102  
11 Telephone: (415) 510-4400  
12 Facsimile: (415) 703-5908  
13 Email: Emilio.Varanini@doj.ca.gov  
Lauren.Zweier@doj.ca.gov

14 DARCIE TILLY (SBN 239715)  
15 Deputy Attorney General  
16 600 West Broadway, Suite 1800  
17 San Diego, CA 92101  
18 P.O. Box 85266  
19 San Diego, CA 92186-5266  
20 Telephone: (619) 738-9559  
21 E-mail: Darcie.Tilly@doj.ca.gov

22 [Additional Counsel on the Signature Page]  
23 *Attorneys for the People of the State of California*

24  
25 IN THE UNITED STATES DISTRICT COURT  
26 FOR THE CENTRAL DISTRICT OF CALIFORNIA

27  
28 PEOPLE OF THE STATE OF  
CALIFORNIA,

Plaintiff,

v.

ELI LILLY AND COMPANY, et al.,

Defendants.

Case No. 2:23-cv-01929-SPG-SK

THE PEOPLE'S STATEMENT  
ADDRESSING DEFENDANTS' NOTICE  
OF UPDATE IN RELATED CASE (ECF  
152)

Courtroom: 5C  
Judge: Hon. Sherilyn Peace Garnett

1           The Court should not follow *Puerto Rico v. Express Scripts, Inc.*, 2024 WL  
2 4524075 (1st Cir. Oct. 18, 2024). The People present facts and arguments not  
3 squarely before the First Circuit, and Ninth Circuit precedent compels a different  
4 result.

5           **CAREMARK**

6           “Acting Under”

7           1. Plaintiff in *Puerto Rico* did not argue the lack of an OPM–Caremark  
8 contract was relevant. 2024 WL 4524075, at \*4 n.2. The People have. ECF 150 at  
9 3-4. Under *Cabalce v. Thomas E. Blanchard & Associates, Inc.*, “acting under”  
10 requires defendants be under federal officers’ “direct orders.” 797 F.3d 720, 729-30  
11 (9th Cir. 2015) (citation omitted). By relying on OPM–plan contracts, Caremark  
12 improperly removed based on an indirect OPM relationship.

13           2. *Puerto Rico* found “acting under” was met because OPM requires  
14 FEHBA plans to require PBMs to transfer, and have transparency about, rebates.  
15 2024 WL 4524075, at \*9. In this circuit, “acting under” analysis focuses on the  
16 “action challenged.” *Lake v. Ohana Military Cmtys., LLC*, 14 F.4th 993, 1004-05  
17 (9th Cir. 2021). Also, *Twombly/Iqbal* govern removal allegations. *Leite v. Crane*  
18 *Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014). Further, “general direction” permitting an  
19 entity to “act at its discretion” does not satisfy “acting under.” *City of Honolulu v.*  
20 *Sunoco LP*, 39 F.4th 1101, 1109 (9th Cir. 2022). Here, Caremark’s “acting under”  
21 allegations do not address rebate negotiation (action challenged) or are conclusory,  
22 and, at most, show general OPM direction and discretionary Caremark conduct.  
23 ECF 150 § I.A.1.

24           3. Regarding Caremark negotiating rebates concurrently: *Puerto Rico*  
25 only considered the off-the-shelf argument presented here with respect to products.  
26 2024 WL 4524075, at \*12. This is inconsistent with *Honolulu*, which states  
27 providing “widely available commercial . . . services” does not satisfy “acting  
28 under.” 39 F.4th at 1107 (citation omitted); ECF 150 § I.A.1.

1       4. Regarding disclaimers: *Puerto Rico* credited Caremark’s indivisibility  
2 assertion. 2024 WL 4524075, at \*9. Here, the indivisibility allegations are not well-  
3 pleaded. They are undermined and contradicted by concessions FEHBA rebates are  
4 identifiable and OPM does not control non-FEHBA conduct. ECF 149-2 ¶8; ECF  
5 149 at 11. Alleged indivisibility does not show Caremark is “acting under” OPM  
6 regarding non-FEHBA rebates. ECF 150 § II.A.

## 7 || Colorable Federal Defense

8       5.     *Puerto Rico's* colorable federal defense conclusion relies on a  
9 subrogation case. 2024 WL 4524075, at \*10. *Puerto Rico* did not consider that  
10 FEHBA treats subrogation and rebates differently. ECF 150 § I.B.1.

11       6.     Regarding disclaimers: *Puerto Rico* cannot override circuit precedent  
12 interpreting ERISA and FEHBA preemption similarly, ECF 150 § II.B, and holding  
13 ERISA does not preempt laws directed at non-ERISA plans, *Washington*  
14 *Physicians Service Association v. Gregoire*, 147 F.3d 1039, 1044-45 (9th Cir.  
15 1998).

16 | Causal Connection

17       7. Plaintiff in *Puerto Rico* did not argue its disclaimers eliminated the  
18 Caremark–OPM connection. 2024 WL 4524075, at \*8 n.8. The People have. ECF  
19 150 § II.D. Caremark’s concession here that OPM did not direct its non-FEHBA  
20 conduct means causal connection is unmet. Caremark cannot say its negotiations  
21 “derived solely” from its OPM duties or it negotiated non-FEHBA rebates  
22 “pursuant to [OPM’s] directions.” *DeFiore v. SOC LLC*, 85 F.4th 546, 553, 557  
23 (9th Cir. 2023) (quotations omitted).

## EXPRESS SCRIPTS

25 || Puerto Rico did not address ESI and does not support its positions.

26 || “Acting Under”

27        8.      Unlike Caremark, ESI does not negotiate TRICARE rebates. Under  
28 *Lake*, “acting under” is unsatisfied. 14 F.4th at 1005; ECF 150 §§ I.A.2, II.A.

## Colorable Federal Defense

9. ESI's failure to negotiate TRICARE rebates means ESI fails to allege this suit will force TRICARE plans to alter coverage. Because TRICARE and ERISA preemption is similar, ESI lacks a colorable preemption defense. ECF 150 §§ I.B.2, II.B; *Gregoire*, 147 F.3d at 1044-45.

10. *Puerto Rico* does not discuss, and cannot undermine, the People's contractor defense arguments. ECF 150 § I.B.3.

## Causal Connection

11. Because ESI does not negotiate TRICARE rebates, ESI cannot claim its negotiations “derived solely” from ESI’s DoD duties nor that it negotiates rebates “pursuant to [DoD] directions.” *DeFiore*, 85 F.4th at 553, 558 (quotations omitted). Causal connection is unmet. ECF 150 § II.D.

## MOTION TO STAY

12. *Puerto Rico* does not address, and cannot undermine, the People’s arguments against a stay. Regarding ECF 146 § I.D specifically, as discussed herein, circuit precedent supports remand.

1 Dated: October 29, 2024

Respectfully submitted,

2 ROB BONTA  
3 Attorney General of California  
4 NELI PALMA  
5 Senior Assistant Attorney General  
EMILIO VARANINI  
Supervising Deputy Attorney General

6 /s/ Darcie Tilly  
7 DARCI TILLY  
8 Deputy Attorney General  
9 *Attorneys for the People of the State of*  
California

10 Lauren Zweier  
(Lauren.Zweier@doj.ca.gov)  
11 Deputy Attorney General  
455 Golden Gate Ave., Suite 11000  
12 San Francisco, CA 94102  
13 Telephone: (415) 510-4400

14 John Ohanesian  
(John.Ohanesian@doj.ca.gov)  
15 Deputy Attorney General  
300 South Spring Street, Suite 1702  
16 Los Angeles, CA 90013-1230  
17 Phone: (213) 269-6000

18 Ryan McEwan  
(Ryan.McEwan@doj.ca.gov)  
19 Deputy Attorney General  
1300 "I" Street  
20 Sacramento, CA 95814-2919  
21 Phone: (916) 210-7548

22 *Attorneys for the People of the State of*  
California

## **CERTIFICATE OF COMPLIANCE**

The undersigned, counsel of record for the People of the State of California certifies that this brief does not exceed 700 words, as determined by the word count feature of Word from Microsoft Office 365, excluding the caption, the signature block, and this certification, which complies ECF 155.

/s/ Darcie Tilly  
Darcie Tilly